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Victim Fault and Victim Strict Responsibility in Anglo-American Tort Law

DOI 10.1515/jtl-2012-0003

Abstract: Anglo-American tort doctrine pays considerable attention to the conduct of the victim as well as the conduct of the injurer. Moreover, a symmetrical standard of care for victims and injurers is commonly invoked: just as injurers are liable for failure to use reasonable care, victims frequently have their compensation reduced insofar as they, too, failed to use reasonable care. The advent of comparative fault, replacing the all-or-nothing rule of contributory negligence, has made the symmetrical approach seem inexorable and unremarkable.

But symmetry is usually the wrong perspective for the legal system to take towards victim and injurer conduct. Moreover, a uniformly symmetrical approach ignores the nuances of legal doctrine. Courts often depart from symmetry, even in comparative fault jurisdictions. Thus, courts recognize several categorical doctrines that permit *full* recovery without regard to the possible fault of the victim (e. g., when the defendant has a duty to protect the victim from his own vulnerability or incapacity, or when the defendant is engaged to provide medical care or other services to the victim necessitated by the victim's own prior fault). Courts also recognize categorical doctrines that automatically *preclude* any recovery despite the supposed presumptive status of comparative fault (e. g., the illegality doctrine, the mitigation of damages doctrine, and the defense of voluntary assumption of risk).

Even when victim conduct *is* compared to injurer conduct, the way in which victim conduct is relevant to tort liability is frequently qualitatively different from the way in which injurer conduct is relevant. Often, when we characterize a victim as being "at fault," we do not mean that the victim should have acted differently, but only that he should be strictly responsible for his choice or action (e. g. because he justifiably forfeited his right to full damages). Indeed, sometimes, even though a victim has a moral or legal right not to take a precaution, it is appropriate to deny him full damages for the harm that the precaution would have averted.

To be sure, symmetry is sometimes appropriate, especially when the actor's unreasonable conduct creates substantial risks both to others and to himself. But

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in many other cases, symmetry is much less defensible, at least if one endorses a largely nonconsequentialist rather than a purely utilitarian account of tort law. The law could do more to address the unjustifiable use of symmetrical criteria – for example, the fact-finder could be instructed, or the trial judge could be directed, to treat unreasonable risk to others as a more serious type of fault than unreasonable risk to self.

Keywords: tort, negligence, contributory negligence, comparative negligence, assumption of risk, mitigation of damages, illegality

1 Introduction

Consider four examples that instantiate the problems addressed in this paper.

1. Distraction (multicar collision)
   A, B, and C, while driving in heavy traffic, are distracted thinking about the season-long ineptitude of their favorite baseball team.[1] Their cars collide, causing injuries to each driver. In each driver's suit against the others, should the driver's own fault reduce his recovery?

2. Daydreaming (driver and pedestrian)
   D, the only driver on the road, is daydreaming about an upcoming music concert. E, the only pedestrian crossing the road, is daydreaming about an upcoming dance concert. Neither notices the other. D's car strikes E. In E's lawsuit against D, should E's own fault reduce his recovery?

3. Religion-based refusal of blood transfusion
   Due to driver F's negligence, his car strikes pedestrian G. A blood transfusion is needed to save G's life. With a transfusion, G would be released from the hospital with no lasting injuries. Because of his religious beliefs as a Jehovah's Witness, G refuses the blood transfusion. He dies. In G's family's lawsuit against F for wrongful death, should G's decision not to permit a blood transfusion reduce the family's recovery?

1 This example was concocted at the end of the 2012 baseball season. That year, the Boston Red Sox had the third highest payroll in Major League Baseball. When the season ended, their won-lost record ranked 29th out of 34 teams. The author then had absolutely no reason to predict the miraculous result of the 2013 baseball season. Thank you, Big Papi.

4. Walking on ice
   J negligently permits a large patch of ice to accumulate in front of the entrance to her store. K notices that he can access the store by taking a longer route around the ice, but he decides to walk on the ice, for the challenge of seeing if he can keep his balance. K slips and suffers injury. In his lawsuit against J, should K's decision to walk on the ice reduce or even eliminate his recovery? Should it do so only if that decision was unreasonable?

Anglo-American tort doctrine pays considerable attention to the conduct of the victim as well as the conduct of the injurer. Moreover, a symmetrical standard of care for victims and injurers is commonly invoked: just as injurers are liable for failure to use reasonable care, victims frequently have their compensation reduced insofar as they, too, failed to use reasonable care. The advent of comparative fault, replacing the all-or-nothing rule of contributory negligence, has made the symmetrical approach seem both inexorable and unremarkable.

But symmetry is ordinarily the wrong perspective for the legal system to take towards victim and injurer conduct. A uniformly symmetrical approach also ignores the nuances of legal doctrine. Careful examination of that doctrine reveals a much more complex landscape, in two major respects. First, even in comparative fault jurisdictions, courts often depart from symmetry: they recognize numerous categorical doctrines that either automatically preclude victims from any recovery (despite the supposed presumptive status of comparative fault) or permit full recovery without regard to the possible fault of the victim. Second, even when victim conduct is compared to injurer conduct, the way in which victim conduct is relevant to tort liability is frequently (though not always) qualitatively different from the way in which injurer conduct is relevant. Often, when we characterize a victim as being "at fault," we do not mean that the victim should have acted differently, but only that he should be strictly responsible for his choice or action and should therefore obtain less than full damages. Indeed, sometimes, even though a victim has a moral or legal right *not* to take a precaution, it is appropriate to deny him full damages for the harm that the precaution would have averted.

The arguments in the paper about the relevance of victim fault and victim choices are specific to tort law. Moreover, I presuppose that tort law is best understood as a mode of private redress for wrongs. Thus, I assume a largely corrective justice or civil recourse view of tort law, not a social insurance or purely consequentialist approach.[2]

2 See, e. g., Ernest Weinrib, The Idea of Private Law (1995); Jules Coleman, Risks and Wrongs (1992); Arthur Ripstein, Equality, Responsibility and the Law (1999); Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311 (1996); Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L. J. 695 (2003); John C.P. Goldberg &

In a broadly funded social insurance system such as worker's compensation or a no-fault compensation scheme, other considerations affect the extent to which victim fault should be considered.[3] Moreover, a deterrence-oriented consequentialist system might justifiably pay very little attention to victim fault in a wide range of cases. In almost all cases where the victim knows that his conduct creates a significant risk of personal injury to himself, it is quite doubtful that changes in victim conduct doctrines will have much, if any, effect on the victim's decision whether or not to act prudently or to confront a known risk.[4] Yet the law contains numerous victim conduct doctrines. Optimal deterrence cannot be their explanation.

The paper is organized as follows. Section 2 provides a brief overview of prevailing doctrine, which endorses a presumptive symmetry approach but also contains nine doctrines that depart from symmetry. Section 3 explains the allure of the symmetry approach and then addresses its inadequacies. Section 4 explores another dimension of the problem – whether victim "negligence" is genuinely analogous to injurer negligence, or instead is sometimes better understood as a

Benjamin C. Zipursky, Torts as Wrongs, 88 Tex. L. Rev. 917 (2010); Kenneth W. Simons, Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy, 41 Loyola L. Rev. 1171 (2008).

3 For example, in a worker's compensation system, in a no-fault accident insurance system, or even in a government-funded medical insurance system, we might want to create strong incentives for covered participants to minimize unnecessary costs. Or, as a matter of fairness to those who fund the system, we might deny coverage for some culpably caused conditions. On the other hand, we might choose to be more generous and entirely ignore victim fault, if this better serves the consequentialist goal of rehabilitating victims. Cf. In re Williams, 205 P.3d 1024 (Wyo. 2009) (considering whether religiously-motivated refusal to accept blood transfusion counts as "refus [ing] to submit to medical or surgical treatment reasonably essential to promote his recovery" and thus disqualifies claimant from worker's compensation benefits); Wilcut v. Innovative Warehousing, 247 S.W.3d 1 (Mo. Ct. App. 2008) (concluding, in worker's compensation claim, that religious beliefs that influenced decision not to pursue a course of treatment should be liberally accommodated, and that employee's refusal to accept blood transfusion, based on sincerely-held religious beliefs, was not an unreasonable refusal of medical treatment.).

4 Suppose a pedestrian, deliberately jaywalking in traffic, knows that her jurisdiction will permit her a full tort recovery if she happens to be injured by a driver who is later determined to be negligent and who has adequate insurance. If she is still willing to take a serious risk of self-injury in these circumstances, then it is not very likely that she would act differently if the legal rule about victim fault were less generous. It is unlikely, that is, that she would decide *against* running the risk simply because, under a contributory negligence rule, the jurisdiction would reduce or eliminate her tort recovery. Given all the uncertainties the pedestrian will face about whether her risky conduct will happen to coincide with being endangered by a solvent tortfeasor, and given that almost everyone would prefer not to suffer a serious injury at all than to suffer the injury but receive tort compensation for it, the deterrent benefit of a contributory negligence or comparative fault rule eliminating or reducing recovery is quite doubtful (at least in cases where the plaintiff knowingly risks serious personal injury rather than minor injury or property damage).

form of victim strict responsibility. Section 5 reviews the nine doctrinal asymmetries and explains why they might be defensible. Section 6 identifies situations in which symmetry is most plausible, and also takes up the question whether risks to self and to others are properly aggregated for purposes of judging the victim's fault. Section 7 concludes.

2 A brief overview of doctrine

In Anglo-American jurisdictions, both contributory negligence and assumption of risk historically served as complete defenses barring the victim's recovery against an injurer for his negligence. Since the mid-twentieth century, the emergence of comparative responsibility has dramatically increased the victim's prospects for recovery. Instead of operating as an all-or-nothing doctrine, contributory negligence is now usually understood as scalar: it reduces recovery in proportion to a victim's fault, rather than eliminating recovery.[5] However, under both traditional contributory negligence and modern comparative fault, a symmetrical understanding of negligence ordinarily prevails: the same formal legal standard governs both victim negligence and injurer negligence.[6]

Thus, the injurer is tortiously liable for failure to use reasonable care with respect to risks he poses to the victim. But the victim is negligent for failing to use reasonable care with respect to the risk that he will suffer injury. For example, with respect to American law, Section 3 of the Restatement (Third) of Torts, Liability for Physical and Emotional Harm provides: "A person acts negligently if the person does not exercise reasonable care under all the circumstances."[7] And comment b states: "The definition of negligence set forth in this Section applies whether the issue is the negligence of the defendant or the contributory negligence of the plaintiff."[8] Moreover, the criteria offered by the Restatement Third of

5 Many American jurisdictions do recognize impure forms of comparative responsibility, under which the plaintiff recovers nothing if he is more than 50% at fault. Moreover, in Australia, Canada, the UK, and the United States, fixed rather than discretionary apportionment rules are sometimes employed, requiring a fixed reduction for a particular type of victim fault (such as failure to wear a seat belt), or requiring a minimum reduction, a maximum reduction, or some combination of these. See James Goudkamp, Apportionment of damages for contributory negligence: a fixed or discretionary approach?, Legal Stud. 1 (2015).

6 This paper often uses the term "contributory negligence" both for the traditional doctrine under which the victim's negligence precluded all recovery and for the modern comparative fault doctrine under which such negligence merely reduces recovery.

7 Restatement (Third) of Torts, Liability for Physical and Emotional Harm § 3 (2009).

8 Id., § 3, cmt. b. See also Dobbs, Hayden, & Bublick, The Law of Torts §219 (2nd ed. updated June 2015).

Apportionment for determining each party's comparative fault share do not distinguish between the conduct of a plaintiff and of a defendant.[9]

The law of England and Wales also employs essentially the same "reasonable person" standard both for negligence and for contributory negligence.[10]

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9 Restatement (Third) of Torts: Apportionment of Liability § 8 (2000) provides:

> Factors for assigning percentages of responsibility to each person whose legal responsibility has been established include
> (a) the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and
> (b) the strength of the causal connection between the person's risk-creating conduct and the harm.

In contrast, the Restatement (Second) of Torts did provide for subtly different criteria for injurer negligence and victim negligence.

> *Difference between negligence and contributory negligence*. Contributory negligence differs from that negligence which subjects the actor to liability for harm done to others in one important particular. Negligence is conduct which creates an undue risk of harm to others. Contributory negligence is conduct which involves an undue risk of harm to the person who sustains it. In the one case the reasonable man, whose conduct furnishes the standard to which all normal adults must conform, is a person who pays reasonable regard to the safety of others; in the other, the reasonable man is a reasonably prudent man, who as such pays reasonable regard to his own safety. This difference may lead to differences in the application of the standard of conduct required.

Restatement (Second) of Torts § 463, cmt. b (1965).

10 See S. Deakin, A. Johnston, & B. Markesinis, Markesinis and Deakin's Tort Law 754–756 (7th ed. 2013); Michael A. Jones, "General Defenses", in Anthony M. Dugdale et al. (eds.), *Clerk & Lindsell on Torts*, 19th ed. (Sweet & Maxwell: London 2006), 3–51 ("The standard of care in contributory negligence is what is reasonable in the circumstances, which in most cases corresponds to the standard of care in negligence."); Glanville Williams, Joint Torts and Contributory Negligence § 88 (1951); J. Goudkamp, 'Rethinking Contributory Negligence", in Erika Chamberlain, Jason Neyers and Stephen Pitel (eds), *Challenging Orthodoxy in Tort Law* (Hart Publishing: Oxford 2013).

"The principles that are used to ascertain whether a defendant breached a duty of care that he owed to the claimant are, for the most part, applied also to determine whether the claimant is guilty of contributory negligence." John Murphy, Christian Witting, & James Goudkamp, *Street on Torts* 190 (13th ed. 2012 Oxford University Press: Oxford) (citations omitted). These principles include an objective form of fault; a requirement to avoid only foreseeable risks; measurement of the actor's conduct against the prevailing standards at the time of injury, not the time of trial; and, in determining the standard of care, weighing the probability and severity of injury against the burden of taking precautions against that injury. Id. at 190–191.

In her illuminating history of the English legislative endorsement of comparative fault, Professor Steele emphasizes that the change was part of a broader trend in tort law, "the

The British comparative negligence apportionment statute applies "[w]here any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons."[11] "Fault" has a single definition for both plaintiffs and defendants: "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, give rise to the defence of contributory negligence."[12] The criteria for apportionment do not suggest that victim and injurer negligence should be analyzed or weighted differently. Indeed, those criteria are quite spare: the statutory requirements provide only that the apportionment must be "just and equitable" (in Great Britain and Australia)[13] or "in proportion to the degree to which each person was at fault" (in Canada).[14]

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exorcism of absolutes." Jenny Steele, "Law Reform (Contributory Negligence) Act 1945: Collisions of a Different Sort", in T. T. Arvind & Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart 2012).

11 Law Reform (Contributory Negligence) Act, 1945, § 1(1).

12 *Id.* § 4.

13 The only guideline for apportionment given in the British statute is that it will be "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage." Law Reform (Contributory Negligence) Act, 1945, 8 & 9 Geo. 6, c. 28, § 1(1) (Gr. Brit.). Like the British statute, the Australian statutes require a "just and equitable" apportionment based on the plaintiff's responsibility. See, e. g., Law Reform (Miscellaneous Provisions) Ordinance 1956 (NT) § 16(1)(b). However, English and Australian courts have developed a few bright-line rules to guide apportionment, such as rules for cases in which the victim in an automobile collision failed to wear a seat belt. Goudkamp, Apportionment of damages for contributory negligence. In the United Kingdom and Australia, both "causal potency" and "blameworthiness," understood as the degree to which the party deviated from the standard of care, are relevant to apportionment. Goudkamp, id. at 3; James Goudkamp, "Defences to Negligence", in C. Sappideen & P. Vines (eds), *Fleming's The Law of Torts* 323 (10th ed. 2012 Thomson Reuters: Sydney). *See also* Podrebersek v Australian Iron & Steel Pty Ltd [1985] HCA 34 para. 10, 59 ALR 529, *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1985/34.html ("The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, i. e. of the degree of departure from the standard of care of the reasonable man... and of the relative importance of the acts of the parties in causing the damage...."). However, Canadian courts appear to consider only blameworthiness, and not causal potency, in apportioning liability. Alberta Wheat Pool v. Northwest Pile, 2000 BCCA 505 (CanLII) paras. 45–46, 80 BCLR (3d) 153, *available at* http://canlii.ca/t/1fnj8. See Goudkamp, Apportionment of damages for contributory negligence, at 2 n. 11.

14 Contributory Negligence Act, R.S.A. 2000, c. C-27; Negligence Act, R.S.B.C. 1996, c 333; Contributory Negligence Act, R.S.N.B. 2011, c. 131; Contributory Negligence Act, R.S.N.L. 1990, c. C-33; Contributory Negligence Act, R.S.N.S. 1989, c. 95; Contributory Negligence Act, R.S.P.E.I. 1988, c. C-21; Contributory Negligence Act, R.S.S. 1978, c. C-31; Contributory Negligence Act, R.S.N.W.T. 1988, c. C-18; Contributory Negligence Act, R.S.N.W.T. (Nu) 1988, c. C-18; Contributory Negligence Act, R.S.Y. 2002, c. 42.

Several Australian states require equivalent standards of care for contributory and injurer negligence by statute,[15] and unifying the two standards was recommended in the 2002 Ipp Report.[16] Canadian law also seems to apply similar standards for victims and injurers.[17]

Moreover, the Principles of European Tort Law vigorously endorse symmetry. Article 8:101, "Contributory conduct or activity of the victim," provides: "Liability can be excluded or reduced to such extent as is considered just having regard to the victim's contributory fault *and to any other matters which would be relevant to establish or reduce liability of the victim if he were the tortfeasor*."[18]

At the same time, Anglo-American courts sometimes do recognize differences in the standards they apply to victim and injurer negligence. Consider three such differences.

(1) Courts sometimes apply a more subjective standard of care to victims than to injurers. "Some [American] courts have frankly [taken into account individual shortcomings] for the plaintiff and not for the defendant – notably where the infirmities of youth, old age, or insanity are concerned."[19] Other

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The Ontario statute uses slightly different wording, referring to the parties' degrees of "fault or negligence," rather than just "fault." Negligence Act, R.S.O. 1990, c. N.1. The Manitoba statute states: "if negligence is found on the part of the plaintiff which contributed to the damages, the court shall apportion the damages in proportion to the degree of negligence found against the plaintiff and defendant respectively." The Tortfeasors and Contributory Negligence Act, C.C.S.M. c. T90 § 4. The Quebec Civil Code simply states that "[w]here an injury has been caused by several persons, liability is shared by them in proportion to the seriousness of the fault of each." Civil Code of Quebec, S.Q. 1991, c. 64, a. 1478.

15 Civil Liability Act 2002 (NSW) § 5R; Civil Liability Act 2003 (Qld) § 23; Civil Liability Act 1936 (SA) § 44; Civil Liability Act 2002 (Tas) § 23; Wrongs Act 1958 (Vic) § 62; Civil Liability Act 2002 (WA) § 5K.

16 Review of the Law of Negligence, Final Report §§ 8.6–8.13 (Sept. 2002), *available at*: http://www.amatas.com.au/assets/ipp_report.pdf [hereinafter *Ipp Report*]. See recommendation 30(b) ("For the purposes of determining whether a person has been contributorily negligent, the standard of the reasonable person is the same as that applicable to the determination of negligence."). The Ipp Report is a review of Australian negligence law, produced by a panel of experts chaired by Judge David Ipp.

17 See G.H.L. Fridman, The Law of Torts in Canada 470 (2d ed. 2002):

> Contributory negligence, equally with negligence, arises from a failure to take such care as the circumstances require. All the elements of actionable negligence must be established save only the requirement of a duty owed by the party alleged to be guilty of contributory negligence (citations omitted).

18 Principles of European Tort Law (2005) (emphasis added), *available at* http://www.egtl.org/.

19 Harper, James, & Gray, 3rd ed, Vol. IV, §22.10, p. 406; Dobbs, et al, at §219. See also Richard Wright, "The Standards of Care in Negligence Law", in David G. Owen (ed.), *Philosophical*

courts have also sometimes applied a double standard.[20] For example, a plaintiff's phobia of being trapped in a car was found to be relevant to whether she was contributorily negligent for not wearing a seatbelt in a motor vehicle accident.[21]

(2) Many American states recognize a "rescue" doctrine, under which a plaintiff who undertakes to rescue another is considered contributorily negligent only if he was "rash or reckless" in that rescue effort and not if he was merely negligent.[22] Similarly, many Anglo-American jurisdictions recognize a rule, the "agony of the moment" rule, that a plaintiff placed in an emergency situation by the defendant's negligence is held to a more lenient standard of care that

Foundations of Tort Law 249 (Oxford University Press: Oxford 1995); Gary T. Schwartz, Contributory and Comparative Negligence: A Reappraisal, 87 Yale L. J. 697 (1978).

20 According to the Ipp Report, §8.11, describing Australian tort law:

> Leading textbook writers have asserted that in practice, the standard of care applied to contributory negligence is lower than that applied to negligence despite the fact that, in theory, the standard should be the same. There is a perception (which may reflect the reality) that many lower courts are more indulgent to plaintiffs than to defendants. In some cases judges have expressly applied a lower standard of care for contributory negligence [footnotes omitted].

21 Murphy, at 191 (citing Condon v. Condon, [1978] R.T.R. 483 (QBD)). It is doubtful that a comparable phobia by a defendant would be deemed relevant. (Suppose a driver, while proceeding through a large puddle, suffers a phobia about being trapped in his vehicle, and thereupon abandons a young child in the car, resulting in the child's injury.).

In Australia, however, courts have rejected this subjectivization. *See Ipp Report*, Recommendation 30. They employ a lower standard of care for plaintiffs only if they would apply the lower standard to a similarly-situated defendant, e. g. when the plaintiff or defendant is a child. Pam Stewart & Anita Stuhmcke, *Australian Principles of Tort Law* 257–258 (2nd ed. 2009 Federation Press: Annandale, Australia, Leichhardt).

22 See Dobbs et al., *Law of Torts* 2nd, at §219, n. 12; Kenneth W. Simons, The Puzzling Doctrine of Contributory Negligence, 16 Cardozo L. Rev. 1693, 1717 n. 61 (1995). The UK perhaps recognizes a similar rule. See Baker v TE Hopkins & Son Ltd [1959] 1 WLR 966 (CA); [1959] 3 All ER 225; S. Deakin, A. Johnston, & B. Markesinis, 196 ("[I]t is unlikely that a defence of contributory negligence will defeat a rescuer. Or, if the defence does apply, the reduction in his damages is likely to be small."); Goudkamp, Defences to Negligence, at 329 ("[S]ometimes the social value of what the plaintiff is doing is so highly esteemed that he or she may even encounter a known and substantial risk without prejudice. For example, a rescuer cannot be charged with contributory negligence unless he or she is downright foolhardy.").

The rescue doctrine was probably the prevailing rule prior to the advent of comparative fault. After comparative fault, however, some jurisdictions qualify the doctrine: they do not categorically exclude consideration of a rescuer's fault when that fault is less than reckless. See, e. g., Dundas v. Real Superstore, 650 So.2d 402 (La. Ct.App. 1995).

accounts for the emergency.[23] This rule extends to plaintiffs who sustain injuries while rescuing a party endangered by the defendant.[24] The agony of the moment rule is essentially an application of the general rule or policy, which applies to injurer negligence as well, that the standard of reasonable care takes into account the surrounding circumstances.[25] However, some courts perceive an additional element of equity here that favors a lower standard for victims: "where the [defendant] had created the danger they ought not to be minutely critical of what the [plaintiff] had done when faced with the danger created by them."[26]

(3) Another widely recognized relaxation of the standard of care for contributory negligence is the 'mere inattentiveness' doctrine,[27] under which a plaintiff may be allowed a momentary lapse of attention that would, for a defendant, constitute negligence.[28] This doctrine is applied most often to workplace scenarios in which the employer breached a safety statute but the employee was also to some extent negligent.[29]

Apart from these three possible differences between the standard of care for injurers and for victims, Anglo-American jurisdictions also recognize some categorical rules that preempt the ordinary comparative fault apportionment that would otherwise apply. Some of the preemptive rules preclude all consideration of victim fault, allowing full recovery of damages; while other rules *deny* any recovery, because of particular characteristics of the victim's conduct or choice.

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23 *See* Jones, ¶ 3–63; Stewart, at 258–259; Fridman, at 471; Williams, at 361.

24 Jones, ¶ 3–64; Fridman, at 471. Also see *Chapman v Hearse* [1961] HCA 46, (1961) 106 CLR 112, *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1961/46.html.

25 Stewart, at 259. *See also Cook v Velkray Pty Ltd* [2002] VSC 361, *available at* http://www.austlii.edu.au/au/cases/vic/VSC/2002/361.html (stating that the agony of the moment doctrine grants no more latitude than what is reasonable in the situation).

26 Gibson v. West Lothian Council, [2011] CSOH 110 [60], *available at* http://www.bailii.org/scot/cases/ScotCS/2011/2011CSOH110.html.

27 *See* Jones, ¶ 3–52; Stewart, at 253–254; Fridman, at 470–471. This doctrine does not appear to be recognized in United States jurisdictions, however.

28 *See* Jones, ¶ 3–52. Although superseded by statute in many jurisdictions, the Australian case *Commissioner of Railways v Ruprecht* [1979] HCA 37; (1979) 142 CLR 563, *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1979/37.html, lays out a similar rule at Australian common law.

29 S. Deakin, A. Johnston, & B. Markesinis, at 756; Stewart, at 253–254. *But see Kakouris v Gibbs Burge and Co Pty Ltd* [1970] VR 502, *available at* http://www.austlii.edu.au/au/cases/vic/VicRp/1970/66.html (rejecting argument that plaintiff is held to lower standard of care when defendant breaches statutory, rather than common law, duty). Because this doctrine holds the plaintiff to a less rigid standard of care, it has been largely rejected under modern Australian law. Stewart, at 255–256.

Consider first some preemptive rules that result in full recovery:

(4) The defendant's duty is precisely to protect the victim from the risks created by the victim's own negligent or intentional conduct, conduct that flows from the victim's vulnerability or incapacity. In such a case, the victim's own fault is often ignored.[30] (Suppose defendant is a nurse employed to care for an Alzheimer's patient, and the patient negligently or even intentionally injures himself.)

(5) The defendant is engaged to provide medical care to the plaintiff for a pre-existing injury, or is employed to repair a pre-existing dangerous physical condition. In such a case, again, courts ignore the victim's own prior fault (e. g., in causing his own initial injury by careless driving, or in causing the dangerous physical condition of his house by carelessly starting a fire).[31]

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30 See Restatement Third of Torts (Apportionment of Liability) § 7 cmt. m (2000) ("Sometimes a defendant has a legal obligation to protect the plaintiff from the plaintiffs own conduct, such as a caretaker of a child or insane person. Using the plaintiffs negligence to reduce the plaintiffs recovery against such a defendant may be inconsistent with the basis of the defendant's liability."); Dobbs et al, The Law of Torts, § 224 at nn. 33–39. Several American courts have held that comparative fault is inapplicable in custodial suicide cases because the defendant's duty extends to preventing suicide, and to allow the decedent's act to extinguish that duty would be illogical. See, e. g., Gregoire v. City of Oak Harbor, 244 P.3d 924, 931 (Wash. 2010) (inmate); Sandborg v. Blue Earth County, 615 N.W.2d 61, 64 (Minn. 2000) (inmate); Sauders v. County of Steuben, 693 N.E.2d 16, 20 (Ind. 1998) (inmate); Hoeffner v. The Citadel, 429 S.E.2d 190, 193 (S.C. 1993) (student at military academy); Hickey v. Zezulka, 487 N.W.2d 106, 120 (Mich. 1992) (student in campus police custody); McNamara v. Honeyman, 546 N.E.2d 139, 146 (Mass. 1989) (custodial patient); Cowan v. Doering, 545 A.2d 159, 165 (N.J. 1988) (custodial patient). In the United Kingdom, this is denominated "the very thing" doctrine. See Commissioners of Police for the Metropolis v. Reeves, [1999] UKHL 35, [2000] 1 A.C. 360, where several judges reason that it would be illogical to describe the very thing the police were under a duty to prevent, the decedent's suicide while in custody, as contributory negligence, assumption of risk, or a superseding cause. See also Goudkamp, Rethinking Contributory Negligence, at 316.

In Reeves, a majority of the court did support a comparative fault apportionment, where the decedent was of sound mind. Courts are more likely to preclude or minimize consideration of the victim's fault in cases where defendant breached a duty to prevent the victim's suicide if the victim has a serious mental illness or infirmity. For example, in Corr v IBC Vehicles Ltd, [2008] UKHL 13, [2008] 1 A.C. 884, Lord Hoffman described the decedent's state of mind, and it relation to liability, as a continuum: "the more unsound the mind of the victim the less likely its is that his suicide will be seen as a *novus actus* [a superseding cause precluding liability]." A majority of the court also stated, however, that suicide can sometimes be considered "fault" for purposes of comparative apportionment. *Id.* [32] (Scott L); *id.* [51] (Mance L), *id.* [58]-[62] (Neuberger L).

31 The medical care scenario is called the "prepresentment negligence" doctrine. See Restatement Third of Torts (Apportionment of Liability) § 7 cmt. m (2000) ("in a case involving negligent rendition of a service, including medical services, a factfinder does not consider any plaintiff's conduct that created the condition the service was employed to remedy"); id., Rep.

(6) A special "plaintiff no duty"[32] rule precludes a finding that the victim is negligent.[33] For example, one has no duty to avoid walking in a dangerous part of a city, in order to avoid the risk of becoming a crime victim.[34] The compelling policy of respecting each citizen's liberty of movement justifies imposing a categorical rule that plaintiff is not negligent, rather than leaving to the trier of fact the ad hoc judgment whether the victim's decision to subject herself to some risk of harm was "unreasonable."

Now consider some preemptive rules that result in no recovery:

(7) The illegality (or *ex turpi causa non oritur actio*) doctrine bars recovery for harms suffered in the course of the plaintiff's own illegal or morally reprehensible conduct.[35] This "illegality" doctrine seems to be a minority rule in the United States,[36] but more widely accepted in other Anglo-American jurisdictions.[37] Even

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Note (employing the language "prepresentment negligence"); Dobbs et al, The Law of Torts, § 224 nn. 40–45. See also Goudkamp, Rethinking Contributory Negligence, at 319.

In the contract to repair cases, typically it is the repair person who claims that the homeowner has negligently created a dangerous condition; but in some cases, the homeowner is injured by the failure of the other to make a proper repair, and the question can then arise whether the homeowner's prior negligence is legally relevant in reducing his recovery. See, e. g., Restatement Third of Torts (Apportionment of Liability) § 7 cmt. m, Illus. 12 (2000):

> A negligently damages his own automobile and takes it to B for repair. B negligently repairs the automobile. The faulty repairs cause the automobile to crash, injuring A. A sues B. The factfinder does not consider A's original negligence in damaging the automobile.

32 I put this phrase in quotes because most contributory negligence "duties" are conditional on the victim choosing to sue; they are not, strictly speaking, legally enforceable duties. See discussion infra.

33 See Ellen Bublick, Citizen No-Duty Rules: Rape Victims and Comparative Fault, 99 Colum. L. Rev. 1413 (1999); Sheila Jeffreys & Jill Radford, "Contributory Negligence or Being a Woman? The Car Rapist Case", in P. Scraton & P. Gordon (eds), *Causes for Concern: Questions of Law and Justice* (1984 Penguiin Books: London).

34 This so-called "no duty" rule should preclude consideration of victim fault, not only in the victim's lawsuit against an intentional tortfeasor such as a rapist, but also in her lawsuit against a landlord or hotel that failed to take reasonable precautions against a foreseeable intentional wrongdoer. See Bublick.

35 *See generally* Jones ¶ 3–02 to 3–32; Stewart, at 331–334; Fridman, at 448–452. For powerful critiques of the illegality doctrine, see James Goudkamp, The Defence of Joint Illegal Enterprise (2010) 34 Melbourne University Law Review 425; Ernest J Weinrib, Illegality as a Tort Defence (1976) 26 University of Toronto Law Journal 28.

36 See Dobbs, et al. *The Law of Torts* §228. For a systematic critique of the American version of the doctrine, see Joseph H. King Jr., Outlaws and Outlier Doctrines: The Serious Misconduct Bar in Tort Law, 43 Wm. & Mary L. Rev. 1011 (2002).

37 See Gray v Thames Trains Ltd [2009] UKHL 33, 1 AC 1339. Recently, some courts have also applied the *ex turpi* doctrine to grossly immoral, but not criminal, conduct, although this is uncommon. Murphy, at 209. *See* Nayyar & Ors v. Sapte & Anor, [2009] EWHC 3218 (Q.B.),

where the doctrine is recognized, its scope is quite unclear. Most courts recognizing the doctrine would apply it to deny the claim of a burglar who sues a landowner for not keeping the basement stairs in good repair,[38] or the claim of one criminal against another when both are engaged in a joint criminal enterprise such as driving at high speed together to escape from a bank robbery.

(8) The victim unreasonably fails to mitigate his damages. For example, he does not follow his doctor's advice after receiving medical treatment for injuries caused by a tortious injurer, and thus increases the severity of those injuries. Surprisingly, despite the advent of comparative fault or apportionment, many courts preclude *any* recovery for the additional damages caused by such a failure to mitigate, even though they are a proximate result of the negligence of the defendant as well as of the victim. To be sure, the Restatement Third of Apportionment proposes to treat mitigation cases in the same manner as other contributory negligence cases, i. e. apportioning (by comparative fault) that segment of damages as to which both the injurer's tort and the victim's failure to mitigate were necessary causes.[39] However, most courts deny any recovery for that segment, contrary to the usual demand for apportionment.[40] Consider this example. D negligently runs over P, breaking P's foot; but P fails to follow his doctor's advice not to walk on his broken foot for two weeks; his failure to

available at http://www.bailii.org/ew/cases/EWHC/QB/2009/3218.html (holding that an attempted civil law bribe triggered *ex turpi*, even though there was no clear breach of criminal law).

38 See, e. g., Barker v. Kallash, 468 N.E.2d 39, 41–42 (N.Y. 1984).

39 Restatement (Third) of Torts: Apportionment of Liability § 3 cmt. b (2000): "This Section applies to a plaintiff's unreasonable conduct that aggravates the plaintiff's injuries. No rule about mitigation of damages or avoidable consequences categorically forgives a plaintiff of this type of conduct or categorically excludes recovery."

40 *See, e. g.* Cheltenham Borough Council v. Laird, [2009] EWHC (QB) 1253 para. 528, *available at* http://www.bailii.org/ew/cases/EWHC/QB/2009/1253.html. See Yehuda Adar, Comparative Negligence and Mitigation of Damages: Two Sister Doctrines in Search of Reunion, 31 Quinnipiac L. R. 783 (2013); Goudkamp, Rethinking Contributory Negligence, at 331–332.

Cases in which the victim failed to wear a seatbelt or motorcycle helmet are similar to mitigation cases insofar as that failure does not causally contribute to the accident itself, but only to the amount of damages suffered. They are dissimilar insofar as the duty to "mitigate" arises pre-accident rather than post-accident. I do not believe that courts should draw a categorical distinction between cases in which victim fault contributes to the accident's occurrence and those in which it contributes to an increase in the damages suffered; nor should they categorically distinguish between pre-accident and post-accident failure to mitigate. For a different view, see Goudkamp, id. at 334–336.

mitigate increases damages from $200,000 to $300,000. Normal apportionment or comparative fault rules[41] would provide that P recovers all of the $200,000 plus a portion of the additional $100,000 in damages, with that portion determined by comparative fault principles. And yet, most courts only permit P to recover the $200,000; they deny P recovery for any portion of the damages that were jointly caused by D's original negligence and by P's unreasonable failure to mitigate.

On the other hand, although courts usually preclude all recovery for unreasonable failure to mitigate damages, they also tend to impose a forgivingly low standard of care in determining what constitutes a failure to "reasonably" mitigate.[42] As one court explained, "[t]he question whether [the victim] was at fault is one which in principle the trial judge should resolve bearing in mind that it was the wrongful act of the defendant which put the claimant in the position of having to [mitigate] and that therefore she should not be judged too harshly."[43]

(9) The victim assumed the risk of the injury he suffered. (Recall "Walking on ice," from the introduction.) Whether assumption of risk should be recognized at all, and if so, whether a narrower or broader version should be applied, are matters of considerable controversy. Most American courts have completely abolished assumption of risk as a defense distinct from contributory negligence, and have instead "merged" the former into the latter. In other words, they simply ask whether the victim acted reasonably or unreasonably; if he acted reasonably, he obtains a full recovery; if not, his recovery might be limited pursuant to comparative apportionment principles.[44] Outside of the United

41 By "normal" I mean the rules that would apply if we were comparing the injurer's fault to a victim's fault that causally contributed to the accident itself. Suppose bicyclist D2 negligently breaks pedestrian P2's foot, but P2's negligent inattention also contributed to the accident. Further suppose that even if P2 had been paying adequate attention, P2 would have suffered a harm valued at $500,000; but P2's inattention increased the harm to $800,000. Under normal comparative fault rules, P2 would recover all of the $500,000 and some portion of the $300,000, with that portion depending on the fact-finder's assessment of the comparative fault of P2 and D2.

42 *See* TAW v. NJS [2011] WADC 187 ¶¶ 88–92, *available at* http://www.austlii.edu.au/au/cases/wa/WADC/2011/187.html (finding no failure to mitigate psychological injuries from sexual assault even though plaintiff refused treatment, because plaintiff was suffering from post-traumatic stress disorder and "victims of post-traumatic stress disorder show signs of 'avoidance' in respect of further treatment").

43 *See* Morris v. Richards, [2003] EWCA (Civ) 232 ¶ 16, *available at* http://www.bailii.org/ew/cases/EWCA/Civ/2003/232.html.

44 See generally Kenneth W. Simons, Reflections on Assumption of Risk, 50 UCLA L. Rev. 481 (2002); Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U.

States, although assumption of risk is still recognized, it is applied quite sparingly.[45]

Nevertheless, some courts do continue to recognize assumption of risk, on the theory that consent is a plausible rationale – and a rationale distinct from contributory negligence – for denying a victim full recovery for otherwise tortious conduct.[46] When a jurisdiction does recognize assumption of risk as a distinct defense, the legal consequence is almost always to preclude recovery entirely, and not simply to apportion damages. Accordingly, assumption of risk is appropriately classified as a preemptive "no recovery" doctrine, for in its absence, the victim perhaps could have obtained at least partial recovery, or even complete recovery, under comparative fault principles.

Consider the "Walking on ice" example from the introduction. Under the American merger doctrine, the pedestrian would obtain full recovery if his decision to walk on the ice was reasonable, and partial recovery (according to the relevant comparative fault criteria) if that behavior was unreasonable. In a jurisdiction that recognizes assumption of risk as a distinct defense, however, he would likely obtain no recovery.

L. Rev. 213 (1987). However, even if a jurisdiction purports to abolish assumption of risk and "merge" it into comparative responsibility, it may achieve a result similar to traditional assumption of risk by recognizing a "primary" assumption of risk category, i. e. a no-duty or limited-duty rule that takes account of the choices and preferences of those who engage in the relevant activity. Thus, a "merger" jurisdiction can still bar a victim's recovery, even when the victim acted reasonably. (Suppose a spectator at a bicycle race through mountain roads is injured by a bicyclist who loses control on the descent.)

45 See K. Barker, P. Cane, M. Lunney, & F. Trindade, *The Law of Torts in Australia* 617 (5th ed. 2012) ("In modern law, very few cases can be found where the defense of *volenti* has succeeded."); Goudkamp, Defences to Negligence, at 335-345 Goudkamp, Rethinking Contributory Negligence, at 341; S. Deakin, A. Johnston, & B. Markesinis, 765–769; Fridman, at 129–131 (Canadian law); Linden, 508–522 at (Canadian law).

46 Some American courts continue to endorse assumption of risk. See Simons, Reflections. A recent English case illustrates that assumption of risk remains a viable defense. Geary v JD Wetherspoon plc [2011] EWHC 1506 (QB) (plaintiff assumed the risk of injury when she chose to slide down an open banister on a sweeping staircase). As the court in Geary explained: "The claimant had freely chosen to do something which she had known to be dangerous.... She knew that sliding down the banisters had not been permitted, but she chose to do it anyway. She had therefore been the author of her own misfortune." Recent Australian legislation is intended to broaden the assumption of risk defense. See Barker et al, at 617. Note also that the Principles of European Tort Law provide a distinct defense of assumption of risk. See Art. 7:101 (1)(d).

3 Symmetry: analysis and critique

With this brief overview of relevant doctrines in mind, let us take a closer look at the content of those doctrines and at possible rationales. As we have seen, courts often treat victim and injurer negligence symmetrically. Indeed, this is the presumptive treatment, absent some special categorical rule. But is it justifiable?[47]

In many cases, this symmetrical standard is quite plausible. Recall the "Distraction" case from the introduction: A, B, and C are all distracted while driving their automobiles. In the ensuing accident, their cars collide, and each is injured. It would be both unworkable and arbitrary to conclude that the standard of care that A owes to B in B's lawsuit for his injuries should differ from the standard of care applicable to A's contributory negligence in her lawsuit against B. (And similarly for the lawsuits by and against C.) The very same act or omission by A created risks not only to B and C, but also to A. And it is fortuitous whether daydreaming while driving will cause injury to another, cause injury to oneself in a one-car accident, cause injury to oneself in a multi-car accident in which another was at fault, or cause injury to oneself in a multi-car accident in which another was not at fault. Although tort law does permit luck to affect liability insofar as the victim must demonstrate a causal connection between the injurer's wrong and the victim's loss, causation is not at

47 The question whether victim and injurer negligence should be treated symmetrically has several aspects. First, should victim and injurer negligence be understood as similar or even identical conceptions of fault? Second, should conduct that is just barely culpable or dangerous enough to count as injurer negligence also count as victim negligence, or should the law require more (or less) dangerous conduct of victims to get over the threshold? Third, even if both injurer and victim have engaged in conduct over the threshold and are negligent in a similar way, should the victim's negligence be weighted less (or more) heavily in a comparative responsibility determination? This paper largely focuses on the first and third questions; however, Section 6 addresses the second.

James Goudkamp addresses a similar set of issues but does not employ the terminology of symmetry. Rather, his critique is addressed to what he calls the "transferability thesis":

> It is widely believed that the principles of law that specify the standard of care that defendants owe for the purposes of the tort of negligence should also be used to determine the standard that claimants must achieve to avoid a finding of contributory negligence. On this view, rules governing the relevance of, for example, the defendant's knowledge, age, mental health and physical characteristics, in asking how the reasonable person in his or her position would have acted for the purposes of the negligence enquiry, should be transferred automatically to the context of contributory negligence.

Goudkamp, Rethinking Contributory Negligence, at 323.

issue in cases such as "Distraction"; thus, the arbitrariness objection remains potent and supports symmetry.

But in other cases, the symmetrical standard can obscure significant differences. Recall the second example from the introduction: E is a daydreaming pedestrian who crosses a street without looking out for automobiles, while D is a daydreaming driver who pays insufficient attention to the risks on the road. In the ensuing accident in which E is injured, E's negligence can be taken into account in a comparative responsibility judgment. In this case, and many other contributory negligence cases, the judgment that E is negligent is based on the risks he poses to himself, not the risks he poses to others.[48] Are self-risk cases really sufficiently similar to risk-to-others cases that the same "reasonable care" standard can and should be applied to both categories?

Granted, if we simply assert the slogan "reasonable care under all the circumstances" (and say it quickly!), the formula *seems* adequate to account for both self-risk and risk-to-others cases. Even if we employ a more elaborate balancing formula, such as the Learned Hand test or one of its variants, the formula might, on first thought, seem adequately general, if the formula turns only on whether the actor has created risks of harm, but does not explicitly differentiate risks of self-harm from risks imposed on others.[49] What could be objectionable about a general strategy of balancing the risks and benefits of taking a precaution? Indeed, doesn't this symmetrical, neutral approach reflect attractive egalitarian values? Consider this argument by the authors of Australia's Ipp Report (a report that has dramatically affected Australian tort law):

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48 To be sure, E's negligence does pose very small risks to others. A driver might need to take evasive action in order to avoid striking E, and the driver might thereby suffer injury. Moreover, E creates more subtle forms of harm to the driver simply by causing the driver to take an additional precaution, and by causing the driver to feel implicated in endangering E. See Simons, Puzzling Doctrine, at 1709–1711. But it is doubtful that these risks and harms, by themselves, are sufficient to make E negligent towards the driver.

Below, I consider the question whether, in determining whether X is contributorily negligent, it is proper to consider the risks X poses to others; and the analogous question whether, in determining whether Y is negligent towards others, it is proper to consider the risks Y poses to himself.

49 Consider, for example, the Restatement Third of Torts' very general definition of negligence:

> Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm.

Restatement (Third) of Torts, Liability for Physical and Emotional Harm § 3 (2009).

> The requirement to apply the same standard of care in dealing with the issue of contributory negligence as is applied in dealing with that of negligence means only that the plaintiff should not be treated differently from the defendant merely because the plaintiff is the person who has suffered harm. It would not, for instance, involve ignoring the fact that of the two parties, the defendant was in the better position to avoid the harm. But the mere fact that a person has suffered harm, rather than inflicted it, says nothing about that person's ability, relative to that of the inflicter of the harm, to take precautions to avoid it.[50]

On this view, the criteria of negligence should treat risks to self and risks to others in precisely the same manner.

But more must be said before we can justify such symmetry. These criteria, whether of "reasonableness" or of "risk-benefit balancing," sound straightforward enough, but their simplicity is superficial. What would a "reasonable person" do? The question is notoriously vague. What would a reasonable person do "under all the circumstances"? This hardly cures the vagueness. Which circumstances are relevant, and how are they relevant? Answering these questions presents difficulties both of fact and value. To be sure, by anthropomorphizing the issues, a "reasonable person" approach seems more grounded and factual than a purely normative question. Yet there is no escaping the normative dimension. Unless a trier of fact is given unlimited discretion to specify what a reasonable person would do, the law will provide some content. And in filling in that content, we cannot avoid the question whether self-risk and risk-to-other should or should not be treated identically. Balancing formulas are less opaque than reasonableness criteria, but they, too, give ambiguous guidance on this critical normative question.

One reason that neutrality might seem to be the proper approach, at least prima facie, is because we can readily identify traits or characteristics that seem equally relevant to risks-to-self and risk-to-others. Daydreaming, inattentiveness, lack of skill, forgetfulness, excessive confidence in one's abilities, excessive discounting of the risks of one's activities, and exaggeration of the value of those activities, are all traits that are potentially dangerous.[51] So it is tempting to conclude that they reflect the same legal and moral fault, without regard to whether they endanger only the actor or only others. The conclusion is too quick, however. It is one thing to recognize that the personal deficiency that

50 Ipp Report, §8.12.

51 Similarly, if one exaggerates the social value of one's activity, this arguably weighs in favor of finding the activity negligent, either with respect to one's own interests or with respect to the interests of others. Exceeding the speed limit because of the sensory thrill it confers might seem equally foolish and socially undesirable, whether the risk is only to self or only to others. Again, however, this conclusion is too quick.

culminates in danger or risk might be the same in both cases, but quite another to conclude that the moral and legal significance of creating the risk is the same whether the risk is to oneself or to another.

Consider a related argument from the Australian Ipp Report, which recommended against a more lenient standard for victim negligence. Some courts, the Report noted, had expressly applied a lower standard of care for victims than for injurers. "This may result, for example, in motorists being required to keep a better lookout than pedestrians. In the Panel's view, this approach should not be supported."[52]

The complaint that motorists should not be required to keep a "better lookout" than pedestrians raises two problems. First, often motorists and pedestrians are not in fact similarly situated with respect to the severity and scope of the injuries that their inattentiveness risks. A motorist's inattention might well endanger numerous pedestrians; a pedestrian's inattention usually endangers only himself. To compare apples with apples, we should assume a case in which a motorist endangers only a single pedestrian, and a pedestrian endangers only himself, each to exactly the same extent. After all, the effort or burden that we should ask an actor to undertake to avoid a risk should vary according to such circumstances: the care demanded of either a pedestrian or motorist on a deserted road is much less than that demanded at a busy intersection.

But, second, we must also equalize all other factors that could be relevant to a negligence determination, including the social value of the interest served by each actor, the motives of the actor, the extent to which the victim understands and freely accepts the risk, and how the benefits and risks of the actor's conduct or activity are distributed among all affected persons.[53] Once we try to equalize all these factors, it becomes clear that a simple insistence that both injurers and victims should "keep a reasonable lookout" in order to avoid a risk of harm evades the important normative questions – especially the question whether creating a risk of harm to oneself should be on a legal par with creating a risk of harm to another.

So it is fallacious to insist, as many writers have, that symmetrical legal treatment is an inevitable implication of neutrality, or equality, or what we might call the "moral parity" of a victim and injurer.[54] Thus, writing a century

52 Ipp report, at § 8–11.

53 It might seem that balancing such a range of factors in order to judge whether an actor is negligent presupposes a utilitarian account of negligence. I disagree. Plausible nonconsequentialist accounts of negligence require balancing. See Simons, Tort Negligence.

54 For further discussion of the argument, see Simons, Puzzling Doctrine, at 1722–1723. For a critique similar to my own, see Robert Stevens, "Should Contributory Fault be Analogue or

ago, Francis Bohlen explained that contributory negligence doctrine developed because "[i]t was manifestly unfair… that any man should be required to take better care for others than such persons are bound to take of themselves. The duty of care for others manifestly should be no higher than the duty of self-protection."[55]

Despite its surface appeal, this argument assumes what needs analysis: whether the identity of the person endangered by the risk (self versus other) is an intrinsically significant feature that should affect a victim's right to recover in tort law. The moral parity argument is no stronger than this structurally similar argument: we should not care *who benefits* from a risky act or activity, but should only care (a) that someone benefits and (b) how large the benefit is. Some utilitarians would endorse the latter argument, insofar as they only care about the maximization of total benefits and minimization of total costs; but those who believe that the law should be sensitive to how risks and benefits are distributed certainly would reject it.

One other reason why the symmetry approach might seem intuitively plausible is the rhetorical power of a simplified version of the Learned Hand test.[56] Law and economics adherents are especially likely to model injurer negligence and victim negligence in similar cost-benefit terms, producing handsome charts that list numerical values to represent the burden or "cost" of care required to avoid harm either to others or to oneself.[57] Thus, in my example above, a chart might display the "cost" to a pedestrian of keeping a "reasonable" lookout as

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Digital?", in A. Dyson, J. Goudkamp & F. Wilmot-Smith (eds), *Defences in Tort* 247, 253 (Hart Pub. 2015):

> [T]he risks I run in relation to my own interests are nobody's concern but mine. If I eat and drink too much, trust people I should not, enjoy high risk sports, don't clean my teeth at night, fail to lock my front door, ignore the warnings on medicine bottles or park my car in East Oxford, no other individual has any standing to complain.

55 Francis H. Bohlen, Contributory Negligence, 21 Harv. L. Rev. 233, 254 (1908).

56 In my view, the Learned Hand test can be used for good as well as evil: it can accommodate more complex forms of balancing and can accommodate distributive values and respect for rights. Although it is typically employed to express a standard of care promoting allocative efficiency, this is not its only plausible use. See Simons, Tort Negligence; Kenneth W. Simons, The Hand Formula in the Draft Restatement (Third) of Torts: Encompassing Fairness As Well as Efficiency Values, 54 Vand. L. Rev. 901 (2001). But for purposes of this paper, I will describe only the oversimplified (evil) version of the test.

57 See, e. g., Shavell. Foundations of Economic Analysis of Tort Law 182–192, 199–206 (2004); Richard Posner, *Economic Analysis of Law* §6.4 (8th ed. 2011); A. Mitchell Polinksy, *An Introduction to Law and Economics* 43–56 (4th ed. 2011 Wolters Kluwer Law and Business: New York.).

50, and the benefit of that precaution in avoiding a harm to himself as 200;[58] and it would display the "cost" to an injurer of keeping a "reasonable" lookout as 50, and the benefit in avoiding a harm to the pedestrian (the only person at risk) as the same 200. In this example, if failing to satisfy the simplified Hand test is indeed equivalent to being negligent, then both actors are negligent, for each has failed to take the cost-justified precaution; and each is equally negligent, because the costs and benefits for each are identical.

Simplifying models certainly can have explanatory value. The problem here, however, is twofold. As already noted, it is quite difficult to be confident that the burden on both victim and injurer really is "equal" with respect to any commensurable value, such as time demanded, psychological or physical effort used, or financial cost. And, more troubling, the use of numerical values in both the self-risk and risk-to-other scenarios obscures the possibility that the scenarios differ intrinsically. Suppose we instead conclude that endangering only yourself is, everything else being equal, much less culpable or a much less serious form of fault than endangering another. For those attracted to the apparent precision of formulas, we could even formalize this difference, by placing an explicit numerical thumb on the scale: in self-risk cases, we might multiply the burden to the victim of taking care by two. Then the revised cost for the pedestrian is 100, while for the driver it remains 50; and in a comparative fault allocation, the driver would pay 2/3 rather than ½ of the pedestrian's damages.[59] Thus, even a numerical formulation of negligence can express the idea that victim and injurer negligence intrinsically differ.

Let us turn from these problematic arguments in favor of symmetry to several potent arguments in favor of a lower standard for victims who endanger only themselves. First, in self-risk cases, the actor is under no actual legal duty to another person.[60] If he fails to act reasonably, the other has no legal claim against

58 This benefit would be the avoidance of the expected harm, which in turn is the foreseeable injury (or injuries) discounted by the probability of the injury (or injuries), e. g. 200 = 20,000 (broken leg) × 0.01 (marginal reduction in probability of broken leg if actor takes the precaution).

59 Note that a "thumb on the scale" approach could also result in a finding that a victim is not negligent at all for failing to incur a "cost" even when the injurer would be negligent for failing to incur the same cost. This would be the case in my example if the cost was initially 110 for both the victim and the injurer. After applying the thumb, the victim's cost is 220, so the pedestrian is not negligent for failing to lookout for negligent drivers. For a discussion of the "thumb" approach as applied to strangers at risk from an activity (in contrast to voluntary participants at risk from the same activity), see Simons, Tort Negligence, at 1215–1216.

60 See Jones, ¶ 3–50; Stewart, at 252–253; Fridman, at 470; Goudkamp, Rethinking Contributory Negligence, at 322–323; Stevens, at 254; Simons, Puzzling Doctrine at 1705–1711.

him. Rather, the actor's failure to act reasonably sometimes affects whether the other has a legal duty to pay full compensatory damages, in the following way. *If* the other has tortiously injured the actor, and *if* the actor chooses to sue for damages, then the other's duty to pay full compensatory damages is qualified, because the fact-finder is empowered to reduce the damages in light of the actor's own fault. At best, then, the self-risking actor has a *conditional* legal duty to act with reasonable care, if he seeks to obtain full compensatory damages for injuries that another has tortiously caused.[61]

Second, apart from the "no legal duty" problem, the justifications for denying a full legal remedy to a victim because of the nature of his conduct need not parallel the justifications for recognizing the injurer's (apparently similar) conduct as tortious. To see why they might differ, we need to take a broader perspective. The remainder of this section first examines purely moral, nonlegal arguments for treating self-risk the same or differently from risk-to-others, and then considers normative arguments about how tort doctrine should heed the lessons of these moral arguments.

The foundation and scope of a purely *moral* obligation to take care to avoid harm surely differs, depending on whether the actor has created a risk of harm to herself or to another. Suppose, in other words, that we consider, not the legal question of what remedy a victim is entitled to obtain from an injurer, but instead these purely nonlegal questions: When is it morally impermissible to create a particular type of risk, either of the self-endangering or other-endangering kind? How much moral blame properly attaches to unjustifiably risky conduct of either kind? In this context, equating both types of conduct becomes quite implausible, at least if one is not committed to a consequentialist approach such as utilitarianism, for several reasons.

First, nonconsequentialist morality is much less tolerant of interpersonal aggregation of risks and benefits than of comparable intrapersonal aggregation. You may decide that you should take a small risk of death in order to swim into the rough seas and save your favorite hat. It hardly follows that a lifeguard or a

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However, when the victim creates significant risks both to others and to himself, his legal duty to others can indeed be relevant to whether he is contributorily negligent. Thus, in Mickelberg v Aerodata Holdings Ltd., [2000] WADC 324, *available at* http://www.austlii.edu.au/au/cases/wa/WADC/2000/324.html, the court noted that the plaintiff pilot's failure to comply with "statutory and established procedures" reinforced other evidence that he acted unreasonably in not checking the fuel levels of his plane.

61 The subcategory of victim negligence that is frequently denominated by "duty to mitigate damages" is thus a clear misnomer; the duty is at best conditional. No one has a legal claim against the victim if he chooses not to mitigate but also chooses not to sue. For a careful analysis of the sense in which comparative fault and the duty to mitigate damages involve a "duty," see Adar, at 804–805.

stranger should take the same risk to save your hat if you are unable to do so. A doctor may permissibly remove one of my kidneys to save my life. It hardly follows that she may permissibly remove one of your kidneys to save my life.[62] When the risks and benefits are located in one individual, it is normally morally permissible for that individual to choose how to weigh their relative value and thus whether or not to risk self-injury for the sake of something else.[63] (And a third party, such as a doctor, may then permissibly act in accordance with that choice.) But when the risks and benefits accrue to different individuals, we have a very different moral problem. Even if the "net" result is the conferral of a benefit that, in some sense, "outweighs" the risk, it greatly matters to the permissibility of the risky conduct which of the following is true:

(a) X exclusively benefits from the risky conduct, and X also is exclusively exposed to the risk;
(b) X exclusively benefits, at the expense of Y, who is exclusively exposed to the risk; or
(c) The distribution of benefit and risk is somewhere between these extremes.

To be sure, a particular moral perspective might well suggest, not that a person has a moral *permission* to balance the risks and benefits that her conduct poses to herself however she desires, but rather that she has a more demanding moral *duty* to herself to balance those risks and benefits in a particular way. And this perspective might seem to support symmetry, insofar as the victim's duty to herself might seem parallel to the injurer's duty to the victim. Thus, many

62 See Aaron James, Contractualism's (Not So) Slippery Slope, 18 Legal Theory 263 (2012); F.M. Kamm, Intricate Ethics: Rights, Responsibilities and Permissible Harm 36–37 (Oxford: Oxford University Press 2007); John Oberdiek, The Ethics in Risk Regulation: Towards a Contractualist Re-Orientation, 36 Rutgers L. J. 199, 203–204 (2004); T.M. Scanlon, What We Owe to Each Other 237 (1998); Simons, Tort Negligence, at 1208–1213; Ashford, Elizabeth and Mulgan, Tim, "Contractualism", §§3, 8, The Stanford Encyclopedia of Philosophy (Fall 2012 Edition), Edward N. Zalta (ed.), *available at* http://plato.stanford.edu/archives/fall2012/entries/contractualism/. Whether the relevant actors consent might seem to explain the difference between the two kidney removal cases, but it does not. Even if, in the first case, I am unable to consent (e. g. due to infancy or mental incapacity or unconsciousness), the doctor acts permissibly. (Imagine that all of the patients the doctor is treating in these examples are unconscious.) But if both of the patients in the second case are unable to consent, the doctor acts impermissibly. Moreover, we might find certain organ donations impermissible even if the donor consents – for example, donations that threaten the life of the donor. It would not follow that removal of an organ from a patient for the good of the patient herself is impermissible.

63 Indeed, some might view self-risk cases as not raising a moral question at all; rather, they only invoke norms of prudence. I thank Greg Keating for this observation.

Kantians believe that every person has a duty to preserve her own life, as well as a duty of self-respect.[64] A consequentialist can also recognize such a duty to self. For example, suppose the most defensible theory of the good is not merely a preference-satisfaction account, but instead recognizes some goods or values as objectively higher than others. Then one can be morally criticized for leading an indolent life, or a life devoted entirely to counting blades of grass, or watching television reality shows, or following the home town sports team – or for taking risks to one's own health for foolish or frivolous or short-sighted reasons. Nevertheless, even if a victim has a moral duty not to create excessive risks of self-injury, the question about symmetry remains: Is the moral obligation not to foolishly endanger yourself as weighty as the moral obligation not to endanger others for similarly foolish or objectively weak reasons? On the Kantian account, the latter seems to be a more stringent duty. The same might be true on an objective goods consequentialist account.

A different moral perspective that might seem to support symmetry focuses on citizens' legitimate expectations of each other. Perhaps we actually expect others to use as much care for their self-protection as for the protection of others.[65] I am dubious of this empirical claim, however.[66] In any case, actual expectations are not determinative; the unresolved moral question is what we are *entitled* to expect of one another.

But there is one significant moral view that does support symmetry. And this view might help explain why many courts and commentators conclude that the same standard of care should apply to victims and injurers. Consider the following (rather demanding) version of utilitarianism, as applied to risky conduct. Every action that endangers life or limb, and every omission to do an act that could reduce the risk to life or limb, is morally wrongful if an alternative action would improve human welfare more; and every person has an agent-neutral duty to minimize losses and maximize gains of human welfare, whether to self or others, to family members or strangers, to fellow citizens or foreign citizens. This flattening formula indeed supports symmetry. It is also the moral theory that underlies many law and economics accounts of legal doctrine. But for familiar reasons, the theory is

64 Allen Wood, "Duties to Oneself, Duties of Respect to Others", in Thomas E. Hill (ed.), *The Blackwell Guide to Kant's Ethics* (Hoboken NJ, Wiley-Blackwell; 2009); Shelly Kagan, Normative Ethics 145–152 (1998) (discussing duties to oneself).

65 See Ipp report, asserting that citizens *expect* "risk-neutrality." § 8.10.

66 To be sure, the difficulty of determining whether another person is posing risks to others or only to himself, and the need to coordinate behavior with other actors (such as drivers sharing the road), are factors militating in favor of a more uniform legal standard of care.

problematic: it does not do justice to how we actually reason about moral questions or to the plurality of moral features that we actually deem relevant.[67]

Although I find inadequate the various arguments for symmetry, I do believe that a victim's self-endangering conduct is morally relevant to his right to complain about the wrong of another who unjustifiably endangered him. But it is relevant, not because it amounts to a parallel or closely similar wrong, but because it renders the victim liable to (a different form of) moral criticism. Accordingly, the victim properly *forfeits* the right to the full remedy that he would otherwise be entitled to.[68] Even in the purely moral realm, the "remedy" or "sanction" that it is legitimate to demand of a wrongdoer depends in part on the victim's own conduct and choices. Suppose you carelessly forgot our lunch date. You need not apologize so profusely if I had promised to remind you that morning but I forgot to do so. Or, suppose you carelessly spilled a drink on my new suit. Your moral duty to pay the dry cleaning costs might be limited to splitting those costs if I rambunctiously waved my hands in your face, contributing to the spill.

Of course, the interpersonal moral norms that apply to risky conduct are not coextensive with the legal norms that should govern that conduct. Nevertheless, the legal norms should and do draw upon those underlying moral norms for much of their content. The "forfeiture" argument I just noted is indeed exemplified in a number of legal rules, both inside and outside of tort law. Within tort law, comparative fault principles apply not only when a negligent victim sues a negligent injurer, but also when he sues an injurer whose tort liability is strict (e.g. when the injurer manufactured a defective product or engaged in an abnormally dangerous activity).[69] This practice has been criticized as incoherently comparing apples and oranges, but the criticism has been widely rejected, and we can now see one reason why. Even when legal actors are comparing victim negligence with injurer negligence, often this is not a comparison of apples with apples, since victim negligence frequently involves the creation of risk only to, or principally to, the victim. If comparison in such cases is acceptable – for example, because forfeiture is the rationale for reducing victim recovery – then comparison in cases where the injurer's liability is strict may be no less legitimate.

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67 For discussions of the deficiency of such a utilitarian account of tort law, see Keating; Simons, Tort Negligence; Wright, The Standards of Care in Negligence Law; Weinrib, at 148.

68 For further discussion of the forfeiture argument, see Simons, Puzzling Doctrine, at 1723–1725. A similar argument is that a principle of self-help justifiably precludes plaintiff from full recovery when he had the ability to prevent the harm or to obtain a substitute remedy. Jason Solomon, Judging Plaintiffs, 60 Vand. L. Rev. 1749 (2007).

69 Some jurisdictions also permit comparative apportionment when the injurer committed an intentional tort. See Dobbs et al, § 497.

The mitigation of damages doctrine, we have seen, limits the ability of an injured victim to recover from the original wrongdoer. It is noteworthy that the doctrine originated in contract law, suggesting that the forfeiture principle is by no means limited to victims who are enforcing their rights under tort law. Another instance of the forfeiture principle is the illegality doctrine, which applies not only in tort but also in contract and unjust enrichment law, and provides that an actor is not entitled to pursue otherwise available judicial remedies if the right he seeks to vindicate flows out of his commission of a crime.[70] Various "good faith" and "clean hands" requirements that are imposed as conditions on granting legal relief can also be seen as forfeiture principles. Statutes of limitations also are partly justified by a forfeiture rationale: normally it is feasible for the victim of a tort or other legal wrong to bring a lawsuit in a timely manner, and it is burdensome to the legal system and to the defendant to require someone to defend against a stale claim that could readily have been brought earlier. Both fairness and efficiency values thus support these restrictions on recovery.

Under the forfeiture rationale, then, the criteria for victim and injurer negligence could differ quite dramatically. For example, fact-finders could judge victim negligence by a purely subjective test of reasonable care, while continuing to employ an objective test for injurer negligence. Victim "negligence" could even be framed in terms other than lack of reasonable care – for example, we might simply ask whether the victim had an understandable reason or explanation for acting as he did. In the conclusion, I briefly consider some reasons why the law has not developed in this way.

4 Victim negligence or victim strict responsibility?

Another dimension of our topic deserves a closer look. Insofar as the moral and legal norms we are discussing are norms of fault or negligence, they have a particular contour, distinguishable from other norms of personal responsibility. Whether victim "negligence" truly deserves that appellation depends upon how well it maps onto those contours. In the following, I will first explain how I believe most judges understand the legal idea of negligence as one species of

70 Contract law and unjust enrichment law also recognize the illegality doctrine. See Winfield & Jolowicz on Tort (E. Peel & J. Goudkamp, 19th ed. Sweet & Maxwell: London 2014); Dobbs et al, §228; Restatement (Third) of Restitution and Unjust Enrichment §§ 32, 63 (2011).

fault,[71] and how they ordinarily understand strict liability. I will then consider whether those understandings extend to victim conduct.

An injurer is negligent if her conduct is deficient relative to a standard of reasonable care. "Deficient" in this context means: we wish she had acted differently; and we would enjoin her conduct if that were feasible. Her primary duty is not to create unreasonable risks of harm that might result in harm; and her secondary duty is to pay when those risks eventuate in harm; but we do not view the damage remedy as simply imposing a price on the activity; rather, we view it as a sanction for conduct that should have been avoided.[72]

An injurer is strictly liable if, without regard to whether her conduct is negligent (or an intentional wrong) and thus "deficient," she ought to pay for the harm she has caused. She does not have a primary duty not to cause that harm in the relevant circumstances; rather, her primary duty is to remedy the harm if it occurs. We do not view the damage remedy in this instance as a sanction, because we do not believe that the actor should not have engaged in the underlying conduct that happened to harm the victim.[73]

The question then arises: is victim negligence best analyzed as akin to injurer negligence in these respects, or instead as akin to injurer strict liability? The view that victim negligence is "legally deficient" is initially attractive: in a perfect world, victims would use reasonable care, and if we could costlessly and effectively enjoin them to do so, that would be desirable, and more desirable than simply taking a portion of damages away from victims if they sue in a subsequent lawsuit against a tortious injurer.

On the other hand, in a pure self-risk case, does the law really care whether or not the victim acts with reasonable care for his own safety, so long as he accepts the consequences (including a limitation on tort recovery) either way?

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71 The deficiency view outlined here is, I believe, consistent with a very wide range of conceptions of what counts as negligent conduct.

72 Simons, Puzzling Doctrine, at 1698–1701; Robert Cooter, Prices and Sanctions, 84 Colum. L. R. 1523 (1984). See also Mark Geistfeld, Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule, 4 J. Tort Law 4 (2011).

73 See Kenneth W. Simons, Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation, 15 Harv. J. L & Pub. Pol. 849, 869–874 (1992); Gregory C. Keating, "Strict Liability Wrongs", in *Oxford Philosophical Foundations of Tort Law* (2014 Oxford University Press: Oxford). For example, even with reasonable care, some products will have manufacturing flaws; and we do not want product manufacturers to invest unlimited resources to prevent all possibility of such flaws.

An alternative view would treat strict liability as reflecting a duty not to cause harm. For discussion, see Gregory Keating, The Priority of Respect Over Repair, 18 Legal Theory 293, 323–327 (2012). I find this view unpersuasive. Among other defects, it cannot account for contexts, such as the incomplete privilege in Vincent v. Lake Erie, 124 N.W. 221 (Minn. 1910), in which causing harm is, all things considered, socially desirable. But I cannot pursue the question here.

On reflection, it seems that the victim's unreasonable conduct often is not deficient in the same sense that an injurer's unreasonable conduct is deficient. Even if the victim's conduct deserves modest moral criticism, this does not seem enough to justify the conclusion that, from a legal perspective, it would be better if the conduct did not occur. At least, this is true of a significant range of conduct that the law currently characterizes as creating unreasonable risks of self-injury. Legal prohibitions against jaywalking, and legal requirements to wear seat belts or motorcycle helmets, ordinarily do reflect a legal judgment that the relevant conduct is deficient.[74] But, when we move beyond such civil and criminal requirements that victims take care, it is much less clear that victim negligence is considered deficient.[75] An accident victim is lazy or busy and fails to consult a doctor promptly. A pedestrian takes a faster path to his destination by walking over a broken sidewalk. It is not clear that the conduct of either is legally deficient, at least not in a sense comparable to the deficiency of the dangerous driver who put the patient in the hospital or of the careless city agency that failed to fix the sidewalk. Rather, the moral failure or lapse of the victim in these cases "only seems relevant in private law if the victim chooses to bring a lawsuit, because only in that circumstance does the victim's conduct sufficiently affect the interests of another (here, the injurer who would otherwise pay full compensatory damages)."[76]

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74 Even in these cases, a legislature might decide that the statutory duty of the victim to take a particular precaution should not be considered in the victim's tort suit against an injurer. Seat belt legislation in the United States sometimes so provides.

75 And conversely, even when a statute explicitly exempts someone from a self-protective precaution, it need not follow that that exemption should also result in the victim recovering full damages against a tortious injurer. See Deakin, A. Johnston, & B. Markesinis, Tort Law at 755:

> A Sikh wearing a turban is exempted from the requirement to comply with the statutory requirement to wear a crash helmet while driving a motorcycle. Whether he would also be able to escape the application of contributory negligence if his failure to do so resulted in him incurring greater injuries in the course of an accident is an open question. (citation omitted)

76 Simons, Puzzling Doctrine, at 1708.

By the same token, however, one might argue that the moral deficiency displayed by a negligent *injurer* who fails to act with reasonable care is also only a conditional deficiency: his negligence only matters legally if the victim chooses to sue the injurer. Still, the situations of victim and injurer are distinguishable. Although there are good reasons for giving the victim the power to choose whether or not to assert a viable claim against the injurer, he does have a moral and legal entitlement that the injurer not unreasonably endanger his welfare. The injurer does not have a comparable entitlement that the victim act reasonably for the victim's own protection. See Stevens.

Consider in this regard the difficult question whether the religious beliefs and practices of a victim are relevant to whether he acted with reasonable care for his own safety. Recall the third introductory example: a driver negligently runs over a Jehovah's Witness, who later refuses a blood transfusion that would have saved his life. Is the driver responsible to pay full damages for the death? Or should that portion of the damages due to the victim's decision not to obtain conventional medical care be apportioned according to the comparative fault of the victim and the driver? The victim does, of course, have a legal right to refuse a blood transfusion, grounded in a general right of autonomy in choosing whether to permit medical treatment, and perhaps also in a right of religious exercise. In that sense, it would be absurd to characterize his decision to refuse a blood transfusion as "deficient" and unreasonable. But, simply because the victim has the right to act in this way, it does not follow that the law should also permit him or his family a full tort recovery for the damages that ensue from exercising that right.[77] If, for religious reasons, a person injured by a negligent driver refuses to see a doctor at all, and the untreated minor injury causes the victim's death, it is defensible to deny full recovery for the death, even though the victim does have a right to refuse all medical treatment.[78]

This result is best described as a *victim strict responsibility* doctrine.[79] The victim's conduct is not necessarily deficient or unreasonable, but still, we have reason to leave the additional loss due to the victim's conduct on the victim, or

77 The question is not an easy one. See Marc Ramsay, The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failure of Mitigation?, 20:2 Can JL & Jur (2007); Olga Redko, Religious Practice as a "Thin Skull" in the Context of Civil Liability, 72 U.T. Fac. L. Rev. 38 (2014); Jennifer Parobek, Note, God v. the Mitigation of Damages Doctrine: Why Religion Should Be Considered a Pre-Existing Condition, 20 J. L. Health 107 (2007); Note, Medical Care, Freedom of Religion, and Mitigation of Damages, 87 Yale L.J. 1466 (1978). On the one hand, injurers are sometimes properly held responsible for a harm that is unforeseeable in degree, under the "eggshell skull" principle. On the other, injurers should not always be responsible to compensate for the unusually costly preferences of victims. Recall Guido Calabresi's famous example of a great violinist-composer who chooses to work in a steel mill in order to write a proletarian symphony, despite the risk of damaging his hand. Calabresi plausibly concludes that the violinist should not be able to recover for the special value of his hand, but if the violinist's hand were injured in an automobile accident, he should recover for that special value. Calabresi reasons that in the latter case but not the former, the activity in question (driving) is essential to full participation in society. Guido Calabresi, Ideas, Beliefs, Attitudes and the Law 24–25 (1985).

78 Consider another extreme case: P adheres to a religious view under which, if she is touched by someone not of that religious, she must cut off her own hand. D, a stranger, comes up to her and maliciously pinches her. She cuts off her hand. I believe that D should have to pay the usual damages for a nonconsensual pinch, but should not have to pay for the loss of the hand.

79 See Simons, Puzzling Doctrine, at 1702–1706.

at least to apportion that additional loss between the victim and the injurer, rather than require the injurer to pay for it. The most important explicit judicial category of victim strict responsibility is the assumption of risk doctrine. But it should be clear that many other supposed instances of "unreasonable" behavior by victims, including many instances of failure to mitigate damages, actually fall within this category as well.

Whether religious practices should modify the "reasonable person" standard is a question that arises, not just when the practices increase the risk of self-injury, but also when the practices increase the risk of injuring others. But in the latter context, courts are (justifiably) unlikely to vary the reasonable person standard to accommodate religious practices that create unusual risks of injury.[80] If Doris, while driving her car, wears a headscarf that obscures her peripheral vision, or refuses to take her anti-seizure medication, then even if religious motivations fully explain her decision, it is quite unlikely that a court will give those motivations much if any weight in determining whether she acted with reasonable care.[81] Here, once again, we have reason not to interpret reasonable care symmetrically. Even though, in an abstract sense, the "burden" of violating one's religious beliefs might be equally heavy in both contexts, there is a qualitative difference between requiring someone to accept that burden when endangering others than when endangering only herself.

5 When symmetrical treatment is least justifiable

Let us review the nine doctrinal asymmetries noted earlier, in light of this analysis. For reasons of space, I will only briefly suggest reasons why many of the doctrines are defensible notwithstanding their asymmetrical treatment of victims and injurers.[82]

80 See Calabresi, at 32–35, 62–66.

81 However, statutory provisions in the child endangerment statutes of many American states protect religiously motivated parents from prosecution when they fail to use conventional medical care, even if this harms the child. See Jennifer Stanfield, Faith Healing and Religious Treatment Exemptions to Child-Endangerment Laws, 22 Hamline J. Pub. L. & Policy 45 (2000).

82 Victims and injurers are asymmetrical in many other respects, too. For example, tort law recognizes various strict liability doctrines for injurers, but does not always recognize corresponding strict responsibility doctrines for victims. See Simons, Puzzling Doctrine, at 1731–1732. Moreover, victims are subject to a more stringent "duty to rescue" than are injurers, insofar as victims who wish to obtain a full tort recovery must take action to prevent a complete stranger from causing them harm. For discussion of this anomaly, see id., at 1737–1744; see also Goudkamp, Rethinking Contributory Negligence, at 325 ("[I]t is much easier for a person to be guilty of contributory negligence by way of a pure omission than to incur liability in negligence.")

Notice that these asymmetries typically involve victims who pose risks entirely or largely to themselves. Thus, in a rough and ready way, the asymmetries reflect the idea that there is an intrinsic difference between unreasonably endangering your own life or limb and unreasonably endangering the life or limb of others, and that the law should consider the second form of fault more serious. The asymmetries are at best crude proxies for this intrinsic difference, however. (For example, a clumsy rescuer might endanger the person in need of rescue as well as himself; or an inattentive worker might also endanger a coworker; and the illegality doctrine often applies to actors who also create serious risks to others.) Moreover, if the only relevant factor in all nine asymmetries was whether the risk was self-imposed or other-imposed, that factor could have been expressed directly. So although I think this factor is quite important, it is not the only explanation of the nine doctrines.[83]

Consider the three ways in which some courts modify a symmetrical standard of care for victims and injurers. The first (1) employs a more subjective standard of care for victims – for example, imposing the lower standard of "the care ordinarily exercised by a reasonable person with the victim's lesser mental capacity." Is this reconcilable with the more objective standard routinely applied to injurers? Perhaps it is. Norms of reciprocity might justify the latter standard: if one acts in the world, one must respect the freedom and security interests of others that one might infringe.[84] But when a person's act or omission directly affects only himself, the reciprocity argument is weaker or absent.

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83 Moreover, the asymmetrical doctrines to some extent merely reflect contingent factual differences between the situations of most victims and most injurers. Insofar as this is true, one could support symmetrical legal criteria but simply insist that the criteria be applied with sensitivity to the facts, facts that often reveal that a victim is not negligent or is not as negligent as the injurer. I agree that such contingent factual differences help explain some of the doctrinal asymmetries, such as the "agony of the moment" rule (2) and the "mere inattentiveness" doctrine (3). See also Simons, Puzzling Doctrine, at 1712–1713 (citations omitted):

> [V]ictims are more likely to face emergencies and thus be excused for their choices. The alleged negligence of victims is more likely to involve an affirmative duty to act, since victims are more often passive in their contribution to harm; thus, judges and juries might be more sympathetic to the victim's unreasonable decision not to rescue himself (i. e., not to prevent the injurer from causing the victim harm). Also, victims might more frequently lack awareness of the unreasonable risks they run, which is often viewed as a lower level of fault than consciously creating such a risk.

84 See Arthur Ripstein, "Philosophy of Tort Law", in J.L. Coleman & S. Shapiro (eds), *The Oxford Handbook of Jurisprudence and Legal Philosophy* 671–677 (Oxford: Oxford University Press, 2001); Ripstein, Equality, Responsibility and the Law.

Moreover, the rescue doctrine, the "agony of the moment" rule, and the mere inattentiveness doctrine ((2) and (3)) usually involve a victim exposing only himself to danger.

Now consider the various preemptive doctrines. Some of them (especially (4)) reflect a social judgment that the defendant is in the best position, and can fairly be expected, to protect the victim from his own vulnerability. But why should we shift the entire responsibility to the defendant in these cases, rather than sharing the responsibility through comparative apportionment? As a practical matter, we cannot realistically expect much care from especially vulnerable victims. Their failure to take care is not very culpable, if it is culpable at all. And we legitimately expect a high level of care to be exercised by those who are compensated for taking on a supervisory role over victims who they know are at high risk of endangering themselves.[85]

The three "no recovery" preemptive rules can, to some extent, be explained by the forfeiture rationale. One who engages in seriously wrongful illegal conduct (7) has a lesser equitable claim to employ costly judicial machinery to vindicate his right not to be injured by the faulty conduct of another. This is especially so when the actor has created serious risks of harm to others as well as to himself, a feature that characterizes many successful illegality defense claims. But I do concede that the illegality defense is potentially quite far-reaching,[86] and more must be said about its proper scope and limits. One proffered rationale for the rule is that a criminal should not profit from his own wrong,[87] but this rationale is patently inadequate: tort damages are designed to compensate plaintiffs for their loss, not to afford them a "profit."[88] Another rationale is the difficulty or impossibility of defining the standard of care for a "reasonable criminal." As the High Court of Australia explained, "it would border on

85 A variation of this last argument also explains category (5): the defendant has a professional or contractual obligation to address the dangerous condition of the plaintiff's body or property without regard to plaintiff's prior negligence in creating that condition.

Category (6) is easily explicable as furthering an overriding social policy such as egalitarian access to public life or respecting liberty of movement.

86 Here is one extreme case. A woman engaged in premarital sexual intercourse with a man who knew he had herpes but did not warn her or employ protection. She contracted herpes. The Virginia Supreme Court barred her claim on the ground that she had participated in an illegal act, fornication, even though her conduct did not put the man at risk of harm. Zysk v. Zysk, 404 S.E.2d 721 (Va. 1990), overruled on constitutional grounds in Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005), discussed in Dobbs et al, § 228.

87 See S. Deakin, A. Johnston, & B. Markesinis, at 777; Stewart, at 332.

88 See Goudkamp, at 442–443.

the grotesque for the courts to seek to define the content of a duty of care owed by one bank robber to another in blowing up a safe which they were together seeking to rob."[89] This rationale, although perhaps exaggerating the practical problem, is consistent with the forfeiture idea: a wrongdoer should not burden the courts with these difficult line-drawing decisions, and more fundamentally, the wrongdoers could easily have avoided both liability and loss simply by obeying the law.

The mitigation of damages doctrine (8) fits comfortably within a forfeiture rationale, as we have seen. The fact that such cases almost always involve only risks to self helps explain why courts often apply an extremely lenient standard of care, a standard under which only highly unreasonable decisions not to mitigate would reduce the victim's recovery. But if the fact-finder does conclude that the victim should have mitigated his damages, courts should, I believe, apportion the damages that the victim and injurer have jointly contributed to by their default. As we have seen, many courts allocate all of those damages to the victim. That routine practice is difficult to justify.

Let us turn, finally, to the consent-based doctrine of assumption of risk (9). The doctrine is controversial, and properly so. Traditional versions of the doctrine broadly prohibited tort recovery even when the victim had no realistic option but to confront a tortiously-created risk. However, in the past fifty years, American courts have moved remarkably far in the opposite direction, with most jurisdictions officially eliminating the doctrine.[90] I believe that this development is in part a reflection of the power of the symmetry view. When "unreasonable conduct" is the reigning paradigm for tort liability, and when the phrase is understood to apply equally to injurers and victims, it is understandable that a court would jettison a doctrine that does not fit the paradigm, especially when the doctrine would preclude recovery and not allow for comparative apportionment.

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89 Gala v. Preston, [1991] HCA 18; (1991) 172 CLR 243, *available at* http://www.austlii.edu.au/au/cases/cth/HCA/1991/18.html. However, in a later case, Miller v Miller, [2011] HCA 9, the "impossibility of setting a standard" test was rejected.

90 English and Canadian courts have not merged assumption of risk into comparative fault, but they have narrowed assumption of risk considerably. Some cases seem to require that the victim's conduct displays that he has decided to waive his legal rights. See S. Deakin, A. Johnston, & B. Markesinis, at 766. I believe that that is an unduly narrow conception. See Simons, Full Preference, at 224–227; Reflections, at 497–498. It seems to mean, for example, that in the common situation where a victim gives no thought to whether his decision to confront a risk will affect his legal right to sue, assumption of risk can never apply. For a good example of the difficulty of applying assumption of risk under these restrictions, see Joe v. Paradis, 2008 BCCA 57.

The consensual rationale underlying assumption of risk is a plausible ground for denying victims recovery, notwithstanding the risk that the doctrine will be employed too widely. Importantly, the force of the rationale has nothing to do with whether the victim acted reasonably or unreasonably. Under either the separate defense of assumption of risk, or under many applications of the doctrine of "primary" assumption of risk whereby the defendant owes no duty or a limited duty to the plaintiff,[91] the relevant characteristic of the victim's behavior is not whether it was reasonable or unreasonable, but whether it was sufficiently voluntary and knowing to amount to a consent to the risks.[92]

Moreover, if the consent rationale is persuasive, it should have preemptive force, and should trump the "unreasonable conduct" rationale. For that is how consent functions: it fully transforms the character of an act from a wrong to an act that is permissible (and indeed often highly desirable).[93] Thus, if the same behavior is both unreasonable and an instance of valid consent, the latter characterization should govern, resulting in a complete bar to recovery, rather than partial recovery under comparative fault.[94]

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91 In some cases, primary assumption of risk is the more plausible theory of nonrecovery. See James Goudkamp, "A Taxonomy of Tort Law Defences", in S. Degeling, J. Edelman & J. Goudkamp (eds), *Torts in Commercial Law* (Sydney, Thomson Reuters 2011), at 478 (discussing a case in which the victim, age six, could not validly consent to the risk). See generally Simons, Reflections, at 500–503. But in other cases, secondary assumption of risk is the apt category – especially in scenarios where most potential victims are unaware of the risk or do not voluntarily confront it, but a subset of victims do adequately consent to the risk. (Suppose a passenger encourages a driver to speed; endangered pedestrians do not assume the risk of injury, but the passenger does, in my view.)

92 See Simons, Full Preference, at 233–235. I have defended the view that assumption of risk should be defined narrowly, applying only (a) when the plaintiff actually preferred the risky option that defendant offered to the non-negligent option that defendant failed to offer or (b) when the plaintiff insisted on the relationship with the defendant. Simons, Reflections, at 504–518.

93 See Heidi Hurd, The Moral Magic of Consent, 2 Legal Theory 121 (1996).

94 Another reason why the consent rationale should trump the victim fault rationale is the paradoxical result that might otherwise ensue. Some jurisdictions have endorsed a partial merger approach, merging unreasonable assumption of risk into comparative fault, but retaining reasonable assumption of risk as a complete defense. See Simons, Reflections on Assumption of Risk, at 493. But this means that the victim who unreasonably assumes a risk may obtain a partial recovery, while the victim who reasonably assumes a risk obtains none. It makes little sense for tort law to treat a reasonable victim more harshly than an unreasonable one.

This paradox has bedeviled American courts that have struggled with the continued role of assumption of risk after the advent of comparative fault, a struggle made more difficult by occasional statutory provisions that specify that "unreasonable assumption of risk" must be merged into comparative fault. See, e. g., Ind. Code §34-6-2-45(b). Such provisions imply that reasonable assumption of risk is not merged, but instead is preserved as a complete defense; the result is to treat reasonable actors more harshly than unreasonable ones.

6 When symmetrical treatment is most justifiable

Is there anything to be said for symmetry?

Indeed there is. In a wide range of circumstances, a tort victim creates significant risks of injury to others as well as to himself, and the very same precaution would reduce both sets of risks. Automobile accidents are a standard, and frequently recurring, example. Participants in sporting and recreational activities frequently pose significant risks to others and also to themselves. Even pedestrians sometimes create risks to others – for example, when the other is an automobile driver or bicyclist and the pedestrian's interference with the path of the car or bicycle creates a substantial chance that the operator will swerve or stop suddenly and suffer injury.[95]

In a case where the very same precaution would prevent both risks to others and to self (such as "Distraction," from the introduction), we usually should apply the same standard of care to the actor, whether he ultimately harms only another, only himself, or both another and himself. In principle, we should, in evaluating the victim's own fault, also consider the risks that the victim poses to others.[96]

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95 See, e. g., *Carrier v Bonham* [2001] QCA 234, [2002] 1 Qd R 474 (pedestrian stepped in front of bus; bus driver applied brakes but could not avoid injuring pedestrian; as a consequence, the driver "has an adjustment disorder, which compelled him to give up bus driving. As a result he has sustained both personal injury and economic loss.").

96 See Simons, Puzzling Doctrine, at 1725–1728. It is crucial that the same precaution would avoid both sets of risks. If this is not the case, then it makes no sense to aggregate the risks for purposes of evaluating the actor's negligence or contributory negligence. Thus, if P is driving in close proximity to pedestrians and also not wearing his seat belt, it make no sense, in judging whether his proximity to pedestrians reflects negligence, to also consider the harms he would have avoided by wearing a seat belt.

For analogous reasons, we might also, in determining injurer negligence, consider the risks that the injurer poses to himself. But if we believe that risks to self alone are instrinsically less serious, perhaps they should be discounted and weighted less heavily than in the converse situation where risks to others make the difference in a contributory negligence scenario. Id. at 1727 n. 84.

For an economic argument in favor of aggregating risks to self and risk to others in both scenarios, see Robert Cooter & Ariel Porat, Does Risk to Oneself Increase the Care Owed to Others? Law and Economics in Conflict, 29 J. Legal Stud. 19, 19–20 (2000); Ariel Porat, Misalignments in Tort Law, 121 Yale L. J. 82, 129–130 (2011). Porat gives this example:

> *Example 5: Speeding*. Driving at 30 mph, John's car skids and hits Tony's parked car. Had John driven 25 mph, he would have avoided hitting Tony's car. If we consider the risk John created for others and himself, the reasonable speed was 25 mph. But if we consider only John's risk to other people, the reasonable speed was 30 mph. The rule of law is negligence. Should the court find John liable in a suit for damages brought by Tony?

Id. at (footnote omitted).

This seems uncontroversial when the risks the victim poses to others are sufficiently great, considered by themselves, that we can fairly characterize his conduct (qua potential injurer) as negligent.[97] The actor's conduct is clearly "deficient" in the strongest sense of the term; and the additional risks he poses to himself, even if they are discounted, would seem to aggravate the deficiency.

But suppose the risks to others are insufficient, by themselves, to ground a duty to others. And suppose the risks to self are also insufficient, by themselves, to characterize the actor as contributorily negligent. Should the additional risks to others push the actor's conduct over the threshold from "reasonable" to "unreasonable"?

They should, if the aggregate risks (to self and to others) are sufficiently great. Risks to others should, if anything, be weighted more heavily than risks to self. In some cases, their existence could and should make a difference between a conclusion of no contributory negligence and of contributory negligence. Thus, imagine that a pedestrian is crossing a street containing vehicular traffic, but the level of risk he poses to his own safety is not quite enough to classify his conduct as contributorily negligent. Now contrast two further specifications of this scenario.

(1) In the first, the risk he poses to the drivers is insignificant. (They are all driving giant SUV's that are far apart from each another.)
(2) In the second, the risk he poses to the drivers is substantial. (They are all driving rickety old minicars in close proximity to each other.)

In principle, we should consider the pedestrian contributorily negligent in scenario two but not in scenario one. At the same time, however, the infrequency of, and difficulty of proving, such fine-tuned differentiations in risk justify ignoring these complexities in our actual legal practice.

7 Conclusion

We have seen that the symmetrical view of victim and injurer negligence, endorsed in many statutory and common law legal criteria, is often problematic. But is it *seriously* problematic?

97 This still will be controversial to nonconsequentialists who believe that aggregating these different categories of risk is unjustifiable. See Wright. I do not agree, however, that this type of aggregation violates nonconsequentialist principles. See Simons, Puzzling Doctrine, at 1725–1728.

For two reasons, it may not be. First, the nine doctrinal asymmetries noted above ameliorate the problem to some extent. Second, actual comparative fault apportionment judgments are quite opaque and almost entirely discretionary. Thus, as a practical matter, the fact-finder is free to analyze victim and injurer negligence differently with little fear of correction by a trial or appellate court.[98] The criteria for apportionment are often extremely vague. (Recall that in Great Britain and Australia, the standard is simply that the apportionment be "just and equitable.") Even when the criteria are more specific, they usually contain multiple factors of indeterminate relative weight,[99] thus permitting, on any particular set of facts, a wide range of judgments of relative fault. Although those making these judgments *might* choose to apply a strict principle of symmetry, they need not. And most observers believe that, as actually applied by judges and juries, the criteria tend to be more forgiving of victims.[100]

However, the law could also do more to address the problematic use of symmetrical criteria. For example, the fact-finder could be instructed, or the trial judge could be directed, that they should consider whether the actor posed risks mainly to himself or mainly to others, and that they should consider the latter a more serious type of fault.

Finally, more attention should be paid to two underexplored issues. The first is what I have called the forfeiture rationale for reducing damages because of victim negligence. Even though victim negligence is not truly parallel to injurer negligence, it sometimes captures a type of fault or deficiency on the part of the

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98 For a thorough analysis of the extent to which comparative apportionment of damages is and should be fixed rather than discretionary, see Goudkamp, Apportionment of damages for contributory negligence.

99 See Restatement Third of Apportionment §8.

100 Consider this explanation by the Reporters to the Restatement Third of Apportionment of why they declined to expressly recognize a different standard of care in victim self-risk cases than in injurer risk-to-other cases:

> [T]he standard for negligence is flexible. To the extent that a jury is influenced by the fact that a plaintiff imposed risks only on himself or herself, there is ample room for the factfinder to account for this factor in assigning percentages of responsibility.... Moreover, a plaintiff's conduct that endangers the plaintiff often also endangers others. The factfinder can take these considerations into account in assigning percentages of responsibility. See § 8. Thus, there is not much need to have rules of law impose a different standard on plaintiffs and defendants.

Restatement (Third) of Torts: Apportionment of Liability § 3 (2000) (Reporter's Note to comment a). See also id., § 3, comment a (stating, without further elaboration: "A plaintiff's conduct that imposes risks on other persons may be valued differently from conduct that imposes risks only on the plaintiff.")

victim, in the sense that an actor who behaves in that way is not entitled to a full tort damage remedy. But it is an open question whether that type of fault is even roughly comparable to injurer negligence. And it is worth considering why some forms of victim negligence seem to be instances of a much *broader* category of victim fault, a category that also limits the rights of those who seek civil remedies other than tort remedies. (Recall that mitigation of damages and illegality are defenses to contract and unjust enrichment claims, not just to tort claims.)

The second underexplored question is the proper scope of victim strict responsibility. Assumption of risk is the most important category here, but it is not the only one. Even when it is not the case that the victim failed to take a "reasonable" precaution, principles of justice or fairness might justifiably preclude the victim from recovering full damages in light of her peculiar preferences and sensitivities.

Notes: Chancellor's Professor of Law, University of California, Irvine School of Law. I am grateful to participants at the Shared Responsibility Conference, University of Oxford, and to participants at a workshop at University of California, Irvine, for their helpful reactions. James Goudkamp, Greg Keating, and Richard Wright offered insightful comments. Mason Kortz provided extremely valuable research assistance and editorial advice.